

JULIO GALINDO

VS.

ROCKWELL BUILDING CORPORATION

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

The claimant, pursuant to K.S.A. 44-528, on June 21, 1999, filed an Application for Review and Modification of Administrative Law Judge Pamela J. Fuller's November 19, 1998, Decision. Claimant contends the original Decision should be modified to reflect an increase in claimant's work disability. Presently, claimant is unemployed even though he has made a good faith effort to find appropriate employment. Accordingly, claimant argues he now has a

post-injury wage loss of 100 percent instead of the 71 percent as originally found by the Administrative Law Judge. Therefore, claimant contends the 100 percent wage loss should be averaged with the 20 percent work task loss entitling him to a 60 percent permanent partial general disability as opposed to the 46 percent originally found by the Administrative Law Judge.¹

But the Administrative Law Judge, instead of increasing claimant's work disability award, found that claimant had worked at a job post-award for four weeks in April and May 1999, that paid him \$214.00 per week. The Administrative Law Judge found claimant voluntarily terminated that employment. Additionally, the Administrative Law Judge found there was no medical evidence contained in the record that the job exceeded claimant's permanent restrictions. The Administrative Law Judge then imputed that \$214.00 per week wage to the claimant. The Administrative Law Judge compared claimant's pre-injury average weekly wage of \$280.00 with the imputed post-injury average weekly wage of \$214.00. This equaled a 24 percent wage loss instead of the 71 percent awarded in the November 19, 1998, Decision. The 24 percent wage loss was averaged with the 20 percent work task loss resulting in a 22 percent work disability instead of the 46 percent originally awarded.

The claimant also appeals from the Administrative Law Judge's denial of claimant's request for reimbursement for \$361.00 of costs for medication prescribed by an unauthorized treating physician. The claimant contends he needs these medications because of the residual and ongoing affects of his work-related injuries and the authorized treating physician, Dr. Mills, failed to recognize claimant's need.

As of November 8, 1999, the date of the review and modification decision, no further temporary total disability or permanent partial general disability benefits were due because the 54.01 weeks of temporary total disability compensation and the 82.72 weeks of permanent partial general disability compensation for the decreased 22 percent work disability had previously been paid under the original 46 percent permanent partial general disability decision.

Conversely, respondent argues the Administrative Law Judge's November 8, 1999, Decision and November 15, 1999, Order Nunc Pro Tunc are correct and supported by the record. Therefore, the respondent requests the Appeals Board to affirm the Decision and Order Nunc Pro Tunc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board concludes the Administrative Law Judge's Decision and Order Nunc Pro Tunc should be affirmed.

(1) The Administrative Law Judge's original decision was entered in this matter on November 19, 1998. For a January 28, 1997, work-related accident, claimant was awarded a

¹See K.S.A. 1996 Supp. 44-510e(a).

46 percent permanent partial general disability based on a work disability and future medical upon application and approval of the director.

(2) After claimant's January 28, 1997, accident, respondent and its insurance carrier provided claimant with medical treatment for his injuries and claimant was paid 54.1 weeks of temporary total disability benefits.

(3) The parties stipulated that claimant suffered a 15 percent whole body permanent functional impairment as the result of the January 28, 1997, work-related accident.

(4) At the regular hearing, the only remaining issues were whether claimant was entitled to a work disability and if so, the appropriate amount and whether claimant was entitled to future medical treatment.

(5) Respondent had claimant examined and evaluated by physical medicine and rehabilitation physician Philip R. Mills, M.D., of Wichita, Kansas. Dr. Mills' impression was status post concussion with very short loss of consciousness and post traumatic headaches. After claimant underwent an MRI examination, Dr. Mills found a small area of posterior lateral disc protrusion at C4-5. Also, at C5-6 and C6-7, the doctor found impingement presumably related to degenerative spurring.

In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Mills opined that claimant had sustained a 10 percent whole body permanent functional impairment. The doctor restricted claimant's activities to avoid repetitious or prolonged neck hyperextension.

(6) Dr. Mills described neck hyperextension as occurring when the head is placed in the far back position with the eyes looking up. The doctor explained this work restriction also related to a restriction not to work above shoulder level, because you cannot work above shoulder level without hyperextending your neck.

(7) Dr. Mills reviewed a list of work tasks that claimant had performed in the 15 years preceding the January 28, 1997, work-related accident. Of the 15 work tasks, Dr. Mills opined that claimant had lost the ability to perform three of those work tasks for a 20 percent work task loss.

Dr. Mills specifically found claimant retained the ability to perform the work task of smoothing cement because that task required claimant to continuously look down at the ground and did not involve looking up with the neck hyperextended.

(8) At the claimant attorney's request, claimant was examined and evaluated by Fernando Egea, M.D., of Overland Park, Kansas. Dr. Egea has been specializing in the practice of neurology and psychiatry since 1962 but is not board-certified in either specialty.

Dr. Egea diagnosed claimant with post-concussion cerebral syndrome in the form of headaches and dizziness plus the typical changes in the concentration, attention-span, and

memory for recent events. Claimant also has developing anxiety and depression secondary to his cognitive dysfunction produced by the head trauma and cerebral injury. Additionally, the doctor diagnosed claimant with mild myofascitis of the right shoulder and right hip all related to his work-related accident.

Based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Egea assessed claimant with a 20 percent whole body functional impairment rating for loss of mental status, right shoulder and right hip range of motion. Fifteen percent of the claimant's 20 percent functional impairment rating was attributed to the loss of mental status. The doctor restricted claimant from performing right shoulder work that required full range of motion or above-shoulder level, avoid long standing or sitting type work, limited a single lift of no more than 25 pounds, a repetitive lift of no more than ten pounds, and should avoid working in high places.

(9) Dr. Egea reviewed a work task list completed by vocational expert Diana Joseph. He found claimant had lost the ability to do 100 percent of those work tasks.

(10) In the original award, the Administrative Law Judge concluded that claimant had demonstrated the ability to earn \$81.25 per week post-injury performing seasonal employment. The Administrative Law Judge's 71 percent wage loss was found by comparing the \$81.25 post-injury wage earning ability to the pre-injury \$280.00 average weekly wage.

(11) The Administrative Law Judge found claimant's work task loss should be based upon Dr. Mills' 20 percent opinion instead of Dr. Egea's 100 percent opinion.

(12) The Administrative Law Judge then averaged the 71 percent wage loss with the 20 percent work task loss for a 46 percent work disability.

(13) Future medical care was awarded upon application and approval of the director.

(14) Claimant appealed the 46 percent award to the Appeals Board. But the claimant dismissed the appeal before oral argument was held.

(15) Claimant was again examined and evaluated by Philip R. Mills, M.D., on April 29, 1999. Dr. Mills' diagnosis was generally the same as when he examined claimant on December 23, 1998, except the doctor made an additional specific diagnosis of right shoulder tendinitis.

The work restrictions to avoid overhead work and neck hyperextension remained the same. Additionally, the doctor specified that claimant should not reach with the right shoulder. Dr. Mills did not change his opinion in reference to permanent functional rating or his work task loss opinion.

(16) After the original award was entered in this matter, with the assistance of the Department of Social and Rehabilitation Services (SRS), claimant obtained a job in April 1999 working for a company named Aeronics located in Hays, Kansas.

(17) Claimant provided the only description in regard to his job duties. Claimant testified the company manufactured car antennas. His job generally involved, "putting pieces in cables." This required claimant to look down all the time which made his head hurt. He also testified his right arm would hurt when he was on a machine. Because his head and arm would hurt while performing his job duties, claimant testified he had to leave work early on occasion. Finally, his employer told him, if he went home early, not to come back. Claimant testified he did have to leave early and did not return to this employment.

(18) Claimant worked approximately four weeks for Aeronics in April and May 1999. Claimant has again been assisted by SRS in looking for other employment, but without success.

(19) Claimant strenuously argues the job duties he had to perform at Aeronics were clearly outside the work restrictions that were placed on claimant by Dr. Mills. Specifically, claimant, in his brief, argues that the requirement that claimant look down all the time while he was performing his work duties at Aeronics is prolonged neck hyperextension and is, therefore, in violation of the permanent restrictions Dr. Mills placed on claimant after both the December 23, 1997, examination and the April 29, 1999, examination.

(20) The Appeals Board concludes, based on Dr. Mills' October 26, 1998, testimony, that neck hyperextension is looking up and not down. In fact, Dr. Mills specifically testified claimant retained the ability to perform the work task of smoothing cement because that particular work task required claimant to look down instead of looking up.

(21) The Appeals Board is mindful claimant testified he had to miss work because the job duties at Aeronics were causing him pain and discomfort. But from the limited description of those job duties that is contained in the record, coupled with the fact there is no medical testimony to the contrary, the Appeals Board concludes claimant failed to prove that those job duties violated Dr. Mills' permanent work restrictions.

(22) The Administrative Law Judge also denied claimant's request for reimbursement of \$361.00 as authorized medical for the cost of medication prescribed by unauthorized physician, Tin Win, M.D. The Appeals Board also affirms this conclusion because the respondent had notified claimant that the post-award authorized treating physician was Dr. Mills. If claimant was in need of medication for the residual affects of his injuries, he was required to return to Dr. Mills with the request and failed to do so.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's November 8, 1999, Decision and November 15, 1999, Order Nunc Pro Tunc should be, and are hereby, affirmed in all respects.

All remaining orders contained in the Decision and the Order Nunc Pro Tunc are adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Douglas C. Hobbs, Wichita, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director